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CIVIL CONTEMPT IN THE FEDERAL COURTS

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Mr. BIDEN, from the Committee on the Judiciary, submitted the following

REPORT

Section 4 of the District of Columbia Civil Contempt Imprisonment Limitation Act of 1989 (Public Law 101-97) instructs the Committee on the Judiciary to study and report on the "current law and procedures with respect to civil contempt in the courts of the United States." Having studied the same, the Committee on the Judiciary files the following report.

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I. SUMMARY

The concerns that led to the enactment of the District of Columbia Civil Contempt Imprisonment Limitation Act of 1989 are legitimate, and they justified passage of that legislation; however, they are not paralleled by similar concerns in the courts of the United States. Last year, Congress was faced with the issue of limiting confinement for civil contempt in the courts of the District of Columbia. Congress has authority over those courts, yet they are subject neither to restrictions on jurisdiction imposed by the Constitution, nor Federal statutes governing the courts of the United States. The District of Columbia is an anomaly in our Federal system, and passage of the District of Columbia Civil Contempt Imprisonment Lim-

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itation Act reflects the unique relationship between the District and Congress.[1]

Child custody disputes, the cases most likely to result in coercive sanctions turning punitive, are rare events in the Federal courts.

Moreover, an 18-month limitation on imprisonment is already in place for civil contempt proceedings in the courts of the United States. The legislative history of that statutory limitation makes clear that Congress instituted the cap for the very reasons that prompted enactment of the District of Columbia Civil Contempt Imprisonment Limitation Act.

Put simply, the Judiciary Committee concludes that, with regard to civil contempt in the courts of the United States, no problem exists, precautionary safeguards already have been implemented, and a change in current Federal law is not warranted.

II. LEGISLATIVE HISTORY

The District of Columbia Civil Contempt Imprisonment Limitation Act of 1989 (Public Law 101-97), enacted on September 23, 1989, amends the District of Columbia Code to limit the length of time for which an individual can be imprisoned for civil contempt in child custody disputes. Section 4 of the act directs the Judiciary Committee to study the current Federal law of civil contempt and to submit a report and recommendations to the Senate by September 1, 1990. Section 4 also directs the Senate Governmental Affairs Committee and the House Committee on the District of Columbia to conduct a joint study of civil contempt law in the District of Columbia.

The Judiciary Committee has studied the Federal law of civil contempt in accordance with the statute's mandate. The committee held no hearings.

III. DISCUSSION

A. Current Federal Law: 18 U.S.C. 1826

Section 1826 of title 28 of the United States Code,[2] the Federal recalcitrant witness statute, sets forth the current general law with respect to civil contempt in the courts of the United States. Section 1826(a) states, in part:

> Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses * * * to comply with an order of the court to testify or provide other information * * * the court * * * may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information.

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[1] Although the statutory responsibility of the Committee on the Judiciary does not include a review of civil contempt procedures in the District of Columbia, that study has been conducted. Section 4 of the District of Columbia Civil Contempt Imprisonment Limitation Act directs the Senate Committee on Governmental Affairs to study "current law and procedures with respect to civil contempt in the courts of the District of Columbia," and to submit a companion report to the report of the Judiciary Committee. The report of the Governmental Affairs Committee examines the experience of the District of Columbia Civil Contempt Imprisonment Limitation Act and makes recommendations concerning whether it should remain in effect.

[2] The full text of the statute is set forth in an appendix.

Importantly, 18 U.S.C. 1826(a) limits the duration of a contemnor's confinement to 18 months or the duration of the underlying court proceeding, which ever is shorter.

Section 1826(b) requires that a recalcitrant witness's appeal of an order directing his confinement, "be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal." This provision for expedited review of appeals is aimed at avoiding the improper and unwarranted confinement of individuals held in contempt of court.[3]

No statistical data is available on the number of individuals imprisoned for civil contempt in the Federal courts, or on the length of these incarcerations. (Letter of Bruce Navarro, Acting Assistant Attorney General, to Senator Glenn, July 5, 1990.) Information identifying civil contempt sanctions according to the types of cases in which they are imposed also is not available.

B. Concerns raised by unlimited confinement for civil contempt

Civil contempt becomes controversial when the sanction imposed—typically, indefinite imprisonment—appears to be unjustifiable in light of the absence of procedural safeguards provided in imposing the sanction. Referring to the child custody dispute that gave rise to the District of Columbia Civil Contempt Imprisonment Limitation Act, the report of the Senate Committee on Governmental Affairs states:

> The *Morgan* case raises the question of how long imprisonment for civil contempt should continue when full due process has not been afforded the contemnor, and after it is arguable that the coercive purpose of confinement has failed. (S. Rep. No. 104, 101st Cong., 1st sess., 2 (1989).)[4]

Traditionally, the relationship between sanction and process has been preserved by the distinction between civil and criminal contempt. *See Hicks* v. *Feiock*, 485 U.S. 624, 631-35 (1988). Criminal contempts normally involve the commission of an act that has been prohibited by law or a court order. A typical sanction for criminal contempt is a fine or a determinate and unconditional prison sentence aimed at protecting the authority of the court; these sanctions are punitive in nature. (Martineau, *supra* note 4, at 681-83.) Due process protections are required before an individual is imprisoned for criminal contempt and, where a prison sentence of more than 6 months is imposed, the contemnor has the right to a jury trial. *Bloom* v. *Illinois*, 391 U.S. 194 (1968).

Civil contempts normally involve an act of omission—a failure to do what has been ordered by the court. Confinement for civil contempt is indefinite and is aimed at obtaining compliance from the

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[3] The procedures established in 28 U.S.C. 1826 codified existing practices in the Federal courts and clarified the appropriate limitation beyond which civil contemnors should not be imprisoned. *See Shillitani* v. *United States*, 384 U.S. 364 (1966); and *Giancana* v. *United States*, 352 F.2d 921 (7th Cir.), cert. denied, 382 U.S. 959 (1965). *See also* H.R. Rep. No. 1549, 91st Cong., 2d sess., reprinted in 1970 U.S. Code Cong. & Admin. News 4007, 4022.

[4] A leading commentator, Prof. Robert Martineau, describes this issue in more general terms:

> Unresolved, however, is the more basic issue that has caused judges and lawyers much difficulty for as long as courts have exercised the contempt power—the relationship between the sanction imposed and the procedure followed in imposing it. (Martineau, "Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt," 50 U. Cin. L. Rev. 667, 680 (1981).)

contemnor. The purpose of the sanction is coercion. Production of the desired information, or other compliance with the court order, is sufficient for the contemnor's release. As the Supreme Court has stated:

> When the [contemnors] carry "the keys of their prison in their own pockets," the action "is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees." *(Shillitani* v. *United States,* 384 U.S. 364, 368 (1966) (citations omitted).)

In cases of civil contempt, the contemnor's ability to effect his own release makes it unnecessary to provide full due process protections prior to his confinement. *Id.* at 370-71.[5]

A parent's failure to comply with a court order in a child custody dispute may fail to fit neatly into the traditional categories of civil and criminal contempt. The Senate Committee on Governmental Affairs, recognizing this problem, wrote in its report on the District of Columbia Civil Contempt Imprisonment Limitation Act:

> In child custody cases, however, the incarceration of a parent for disobeying a court's order to produce the child can only be ended when the parent surrenders the child, or the child is found by other means. That fact distinguishes civil contempt arising out of a child custody case from civil contempt in many other types of cases. (S. Rep. No. 104, 101st Cong., 1st sess., 3 (1989).)

The passions involved in a child custody dispute can serve to mute the coercive effect of the civil contempt sanction. After some period of time, confinement in these cases may become, as one writer has described it, "at once, both onerous and ineffective." (Ronald Goldfarb, Washington Post, October 2, 1989, at A15.) Producing one's child in a heated custody dispute simply is not the equivalent of taking a key from one's pocket. At some point, the nature of the sanction may change from coercive to punitive. If that occurs, the confinement becomes both ineffective—because it fails to serve its coercive purpose—and onerous—because it constitutes punishment in the absence of due process. See In re Grand Jury Investigation (Braun), 600 F.2d 420, 423-27 (3rd Cir. 1979); and *Lambert* v. *State of Montana,* 545 F.2d 87 (9th Cir. 1976). The District of Columbia Civil Contempt Imprisonment Limitation Act identifies that point, in child custody disputes, as 12 months.

C. Current Federal law need not be changed

The Judiciary Committee believes that the concerns addressed by the District of Columbia Civil Contempt Imprisonment Limitation Act do not warrant changes in existing Federal civil contempt law. Neither the specific case of confinement for civil contempt in child custody disputes, not civil comtempt in general presents the courts of the United States with problems of the nature confronted by the District of Columbia Civil Contempt Imprisonment Limitation Act. First, an existing Federal statute, 18 U.S.C. 1826, already limits

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[5] Minimal procedural safeguards—notice and a hearing—are required, however.

confinement for civil contempt to a maximum of 18 months. Second, child customdy cases typically are not within the jurisdiction of the Federal courts.

1. 18-Month limitation on confinement

Section 1826(a) of title 18 limits confinement of recalcitrant witnessed to 18 months, or the duration of the underlying court proceeding or grand jury term, whichever is shorter. Differences of opinion may exist as to whether 18 months is the appropriate point at which to limit confinement.[6] Regardless of these differences, however, a limitation is in place beyond which no recalcitrant witness will be imprisoned for civil contempt in the courts of the United States

Section 1826(a) applies generally to recalcitrant witnesses in the courts of the United States. Clearly, the statutory language is broad enough to cover child custody disputes of the type that led to the enactment of the District of Columbia Civil Contempt Imprisonment Limitation Act.[7] Once a judge orders a parent to disclose the whereabouts of a child—whether for visitation or any other purpose—failure to disclose where the child is located would constitute a refusal by a witness "to comply with an order of the court to testify or provide other information."[8]

The legislative history of section 1826(a) indicates that Congress purpose in establishing this cap was much the same as the congressional intent behind the District of Columbia Civil Contempt Imprisonment Limitation Act:

> The confinement is civil, not criminal; its purpose is to secure the testimony through a sanction, not to punish the witness by imprisonment. As amended by the committee confinement is, therefore, limited to the life of the court proceeding or the term (including extensions) of the grand jury before which such refusal to comply with the court order occurred, but in no event shall confinement exceed 18 months. (H.R. Rep. No. 1549, 91st Cong., 2d sess., reprinted in 1970 U.S. Code Cong. & Admin. News 4007, 4022.)[9]

Section 1826(a) establishes 18 months as the point beyond which a recalcitrant witness may not be detained in proceedings before the courts of the United States. This limitation was established to

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[6] Supporters of a cap on imprisonment for civil contempt differ on the point at which the confinement should be ended. Professor Rendelman states: "If the recipient of a threat to imprison thinks it will be imposed, most threats will be effective; 18 or 12 or six months does not hamper judicial credibility." (Written Statement of Prof. Doug Rendelman, July 21, 1989, Hearing Transcript on S. 1163, at 61.) Judge Peter Messitte, of the Circuit Court of Maryland, believes a period of longer duration may be necessary: "I suppose a year is long enough to know what somebody is going to do, but there may be some small group of people who will be influenced between the 12th and 18th month to change their mind and comply with the court order. That is a difficult one to say. My concern is more that that cap not be too low." (July 21, 1989, Hearing Transcript, at 16.)

[7] For reasons explained in detail in subsection 2, infra, there are few instances in which a child custody dispute would be heard in Federal court.

[8] The statute does not cover all civil contempt. For instance, failure to comply with an injunction concerning activities outside of the judicial process would not be covered by the recalcitrant witness statute.

[9] Congressional concerns about the unwarranted confinement of recalcitrant witnesses, and the detention of contemnors in violation of due process standards, also resulted in passage of the expedited appeal provisions included in section 1826(b).

prevent civil contemnors, imprisoned to obtain compliance with a court order, from suffering a punitive sanction without the safeguards of due process. A separate limitation for child custody disputes would be redundant.

2. Federal subject matter jurisdiction

Article III, section 2 of the United States Constitution limits the jurisdiction of the courts of the United States primarily to cases concerning questions of Federal law, and cases where the parties are citizens from different States. Article I, section 8 of the Constitution, the so-called enumerated powers clause, along with the tenth amendment, limits Federal lawmaking authority to specified subject categories. Lawmaking areas not enumerated in the Constitution are reserved for State action.

Most domestic relations topics, including disputes over the custody of a child, therefore are governed by State law and are reviewed by State courts.[10] Because there are few overriding national considerations in the family law area, States are free, for the most part, to legislate in this area as they see fit.

The District of Columbia Civil Contempt Imprisonment Limitation Act modifies civil contempt procedures only with respect to child custody disputes. As the District of Columbia's trial court, the Superior Court, through its Family Division, must necessarily have general jurisdiction over cases involving the custody of a minor child. Otherwise, a forum for family law matters would not exist in the District of Columbia. There is no parallel jurisdictional need, nor any analogous grant of jurisdiction, in the courts of the United States.[11]

The experience of the courts of the District of Columbia, Congress' judgment in the District of Columbia Civil Contempt Imprisonment Limitation Act, and now this study conducted by the Committee on the Judiciary, all indicate that the likelihood of a coercive sanction becoming punitive is most substantial when a contemnor is confined in a child custody case. Senator Orrin Hatch, the primary sponsor of the Senate legislation and a member of this committee, supported this view in testimony before the Committee on Governmental Affairs. The Governmental Affairs Committee's report explains:

> Senator Hatch stated, in support of [the legislaton], his preference for limiting the bill to child custody cases be-

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[10] Federal intervention in the area of domestic relations has been limited to interstate activities and the relationship between the laws of different States. Congressional action in these areas is allowed by the commerce clause. (U.S. Constitution, Art. I:, sec. 8, cl. 4.) Examples include: a requirement that each State give full faith and credit to child custody determinations made by other States (28 U.S.C. 1738(a)); a requirement that appropriate nonjudicial public records of each State be admitted in other State courts (28 U.S.C. 1739); the creation of an office in the Department of Health and Human Services to help States locate parents who have failed to make court-ordered child support payments (42 U.S.C. 653); and, assistance in the location of noncustodial parents who have abducted their children from custodial parents in violation of court orders (42 U.S.C. 663).

[11] The experience of State courts, like that of the courts of the District of Columbia, does not reflect the experience of the Federal courts. In addition to important differences in subject matter jurisdiction, few States have implemented statutory limitations on confinement for civil contempt. Although a State allowing for the open-ended imprisonment of civil contemnors could be confronted by due process problems relating to its contempt sanctions, these concerns have not come to light in the courts of the United States.

> cause the need for limits on incarceration for civil contempt has been most compellingly demonstrated in that area * * *. (S. Rep. No. 104., 101st Cong., 1st sess., 4 (1989).)

In the absence of any pressing need to reform the existing 18-month limitation on confinement provided by 18 U.S.C. 1826(a), the Judiciary Committee recommends against changing the status quo.

IV. APPENDIX

§ 1826. Recalcitrant witnesses

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide suc information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions,

before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

(c) Whoever escapes or attempts to escape from the custody of any facility or from any place in which or to which he is confined pursuant to this section or section 4243 of title 18, or whoever rescues or attempts to rescue or instigates, aids, or assists the escape or attempt to escape of such a person, shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both.

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